IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 950

SAMUEL B. SMITH,

Petitioner,

v.

JAMES MANUFACTURING COMPANY and ELMIRA HATCHERIES, INC.,

Respondents.

RESPONDENTS' SHORT ANSWER TO PETITIONER'S REPLY BRIEF.

H. A. TOULMIN,

H. A. TOULMIN, Jr.,

Counsel for Respondents.

BENNETT PRINTING COMPANY, SPRINGFIELD, OHIO

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That reply (page 3), referring to the Grant Tire Certioraries, states incorrectly "It is, in fact, a precedent for the grant of certiorari" in this case; and further states:

> "In the Grant tire litigation, petitions for certiorari were presented on three different occasions when there was no conflict between decisions of

> Courts of Appeals on the same issue, and all three applications were denied."

But this Court stated the conflicts in the records of the Second Circuit and the Sixth Circuit Courts of Appeals in its opinion in 220 U. S. 428, as quoted on page 5 of Respondents' Main Brief in this case.* Thus there was different proof on the vital issue of whether there was, or was not, a tipping action of the rubber tire in the Grant patent.

Finally, in their Reply Brief, they say:

> "Respondent James urges that certiorari should not be granted because the conflicting decisions of Courts of Appeals were based on different records. The Grant tire litigation is a precedent against respondent on this point." (P. 3, top p. 4.)

But in *Diamond v. Consolidated*, 220 U.S. 429, this Court specifically reviewed and compared the testimony in the Diamond case in the Second C. C. A. with the testimony in the Goodyear case in the Sixth C. C. A. yet made no finding that the different record in the Goodyear case, and the different opinion based on that record, were wrong, or should be set aside. The Goodyear case was listed on the second page of the Diamond opinion in 220

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* In Consolidated Rubber Tire Co. v. Firestone, 151 F. 237, the Second C. C. A. declared:

"The arguments for and against the patent will be found admirably stated by Judge Thomas in the Columbia Case and by Judge Lurton in the Goodyear Case, respectively. To this discussion little can be added on either side. We shall endeavor, therefore, to confine our attention mainly to the new facts and features which have been added to or developed from the records in the earlier cases." (P. 238.)

"In view of this new aspect of the case we have no reason to doubt that on the present record the Court of Appeals of the Sixth Circuit would reach a result favorable to the patent."

"We are convinced, in view of the new testimony, that he (Firestone's expert) is correct." (P. 239.)

U. S. 428, together with a long list of other cases on the Grant patent. *All of these different rulings, including that in the Goodyear case, were mere citations of what other Courts had done.* And then the learned opinion of this Court simply "affirmed" the opinion of the Court of Appeals for the Second Circuit.

In consequence of that failure of the Consolidated Company to get a decision from this Court reversing the opinion in the Sixth Circuit, based on its different record in *Consolidated v. Goodyear,* the Consolidated Company later filed its third petition for a Certiorari, and that was denied. 223 U. S. 724.

In this third petition, filed in the October Term, 1911, Consolidated set up the claim that there was conflict between the decision of this Court in *Diamond v. Consolidatd,* 220 U. S. 428, and the decision in the Goodyear case decided in the Sixth C. C. A. by Mr. Justice Lurton, Mr. Justice Day, when Circuit Judges, and Judge Severens.

Accordingly, we submit there is nothing in petitioner's reply to justify this Court in granting the present certiorari petition where the record and testimony in *Smith v. James and Elmira* differ to a far greater extent, and in character, than was true of the differences in the record in the Goodyear case as compared with the Diamond case.

Therefore, as the decision of the Court of Appeals for the Sixth Circuit, with the far different record in it, has been allowed to stand, though indirectly brought before this Court in 220 U. S. 428, so also following that precedent, we beg to submit that the decision of the Court of Appeals of the Second Circuit, with its different record from the records in the other litigation on the Smith

patent, be allowed to follow the same course as this Court has allowed the Goodyear case to take, under the like circumstances of the Grant patent being sustained in 220 U. S. 428 and held void by the Sixth C. C. A., 116 F. 363.

Under the opinion and decree in the Second Circuit the Smith patent was made invalid in that Circuit, *or at least invalid as against these respondents,* whose rights were there adjudicated.

And finally, the Smith patent has now expired—on April 16, 1935.

Respectfully submitted,

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H. A. TOULMIN, JR.,
Attorneys for Respondents.

Dayton, Ohio,
May, 1936.